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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 269

HUMBLE OIL & REFINING COMPANY,
A CORPORATION,
Petitioner,

vs.

MABEL W. MARTIN, ANNIE M. KELLY, SUE KELLY MEE, W. J. VOLLOR, LANDMAN-TELLER, JAMES P. BIEDENHARN, L. C. GWIN and R. D. KUEHNLE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. _____

HUMBLE OIL & REFINING COMPANY,
A CORPORATION,
Petitioner,

vs.

MABEL W. MARTIN, ANNIE M. KELLY, SUE KELLY MEE, W. J. VOLLOR, LANDMAN TELLER, JAMES P. BIEDENHARN, L. C. GWIN and R. D. KUEHNLE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Humble Oil & Refining Company, a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decisions of the United States Court of Appeals for the Fifth Circuit rendered on December 29, 1961, on direct appeal and on April 27, 1962, on petition for rehearing, which, being a divided court in each instance, affirmed a judgment of the United States District Court for the South-

ern District of Mississippi granting Respondents, appellees in said courts, relief sought on questions of jurisdiction and right to recovery.

I.

JURISDICTION.

Jurisdiction to review this case on petition for writ of certiorari is conferred upon this Court by 28 U.S.C., Section 1254(1).

The opinion of the United States Court of Appeals for the Fifth Circuit on the appeal proper was filed on December 29, 1961, and the opinion on petition for rehearing was filed on April 27, 1962. Application to said Court of Appeals to stay the mandate pending the filing of this petition for writ of certiorari has been overruled and denied but no action has been taken by the District Court; and if there is attempt at action in the District Court with no relief granted there, Petitioner will apply to this Court thereasto.

II.

OPINIONS BELOW.

The opinion of the District Court (R. 426-435) is reported in 199 F. Supp. 648, with judgment thereon printed in the record (R. 446-49). An additional order of the District Court was entered on September 7, 1960, granting appeal under authority of 28 U.S.C., Section 1292(b) (R. 452-54).

The major opinion of said Court of Appeals of Circuit Judges Cameron and Wisdom, with per curiam dissent of District Judge Thomas, appears in 298 F.2d 163 and is also printed in the record (R. 471-483); and the majority opin-

ion of said Court on petition for rehearing and the dissenting opinion of District Judge Thomas appears in 301 F.2d 313 and is also printed in the record (R. 530-31).

The Supreme Court of Mississippi opinion of Judge Holmes appears in 90 So.2d 635 and is also printed in the record (R. 170-187), and the Supreme Court of Mississippi opinion of Judge Holmes on suggestion of errors, comparable to petition or rehearing, appears in 92 So.2d 244 and is also printed in the record (R. 188-89).

III.

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Whether 28 U.S.C., Section 1332(a)(1), when applied to the facts of this case, vests jurisdiction in the United States District Court for the Southern District of Mississippi since some of plaintiffs, Respondents here, and indispensable and necessary parties defendant, including trustees under last will and testament of deceased party, are Mississippi residents, there being involved Mississippi property with claims of right thereto by both Mississippi plaintiffs and indispensable Mississippi parties claiming adverse to Mississippi plaintiffs.

2. Not only whether under the laws of the State of Mississippi and opinion of the Supreme Court of Mississippi relating to property rights of parties hereto, the trustees under the last will and testament of Mrs. Anna F. C. Martin, deceased, are indispensable parties, but also whether said trustees had right to execute oil, gas and mineral lease as was done to bind the ultimate remaindermen because the power of trustees was fixed in last will and testament of Anna F. C. Martin as interpreted by the

Supreme Court of Mississippi in case of *Martin* v. *Eslick*, 90 So.2d 635 and 92 So.2d 244, to "hold, own and manage" the property which carried with it the right to execute oil, gas and mineral lease, and which lease is binding on all parties.

3. Whether the Circuit Court of Appeals violated the general rules of construction as to contracts to involve private and public interests and thereby create a novel and important question of peculiar gravity, and in conflict with applicable local decisions, causing a different standard of proof from that heretofore prevailing.

4. Whether the opinion of the Circuit Court of Appeals is in conflict with other like courts in other circuits and with the opinions of the Supreme Court of Mississippi relating to the rights of the parties in this very case, and contrary to opinions of the Supreme Court of the United States, including that of *Thompkins* v. *Erie R. Co.*, 304 U.S. 64, 58 S. Ct. 817, 92 L. Ed. 1188.

5. Whether the Circuit Court of Appeals has through opinion rendered violated the 5th and 14th Amendments to the Constitution of the United States, depriving Petitioner of due process of law by making a strained and uncommon construction of oil, gas and mineral lease contract and of last will and testament of Mrs. Anna F. C. Martin, deceased, and the rules of law applicable thereto.

IV.

STATEMENT OF CASE.

Mabel W. Martin, widow of Eugene Martin, deceased, and her grantees, Respondents hereto, instituted this action against Petitioner to upset existing oil, gas and mineral lease executed by J. Gaillard Martin and Francis C. Martin, sole surviving trustees of Mrs. Anna F. C. Martin,

deceased, dated April 21, 1945, and for accounting and for declaratory judgment under Federal Declaratory Judgment Act (R. 2-9). Of the eight plaintiffs, seven thereof are citizens and residents of Mississippi. The defendant, Humble Oil & Refining Company is a non-resident corporation. Mrs. Anna F. C. Martin died on December 3, 1942, leaving a will with a life estate in property in question to Anna F. B. Martin Eslick for the term of her natural life and for the use and benefit of Frederick Martin Eslick for the term of his natural life, and upon the death of the survivor of said beneficiaries the trust was to terminate and the then corpus was to be delivered to the heirs of Mrs. Anna F. C. Martin (R. 165). The Supreme Court of Mississippi in judgment of November 12, 1956, held that the oil, gas and mineral lease executed by the trustees was adjudged to be a valid lease and in full force and effect from the date thereof and that the surviving trustee would collect any royalties payable under the oil, gas and mineral lease as trustee (R. 165). Subsequently, on rehearing, through opinion of January 28, 1957, aforesaid, the Court amended its opinion with statement that "The Court's decision involved a construction of the will of the decedent and the determination of the question as to the right of Mrs. Eslick during her lifetime to be paid the royalties derived from an oil lease executed subsequent to the death of the testatrix. *Exeept to the extent that such decision might affect the validity of any oil and gas lease executed by the testamentary trustees,* the question of the validity of oil and gas leases was not passed upon or decided by the Court." (Emphasis ours) (R. 189). The opinion and judgment of the United States District Court and of the United States Court of Appeals for the Fifth Circuit aforesaid are contrary to the opinion of the Supreme Court of Mississippi in the cause involving the very subject matter and also to case law in Mississippi and in

the Circuit Court of Appeals for the several Circuits and the Supreme Court of the United States.

The sole surviving trustee, J. Gaillard Martin, the life tenants, and the ultimate remaindermen are indispensable parties. Berkely Plantation here involved was under oil, gas and mineral lease at time of death of Mrs. Anna F. C. Martin. The trustee under the last will and testament of the deceased either had a right to execute lease, which was a warranty conveyance, or to his day in court for a contrary decision which would require of him forfeiting income and funds to the estate obtainable from royalty or production of an undivided 1/30th interest claimed for Respondents which would reduce that to be received by him from Petitioner and thereby reduce the corpus of the trust estate; and the two individuals identified as holders of life estates should have been named parties defendant in addition to the trustee; and the ultimate remaindermen should have been so named, and these parties are Mississippians, as are all of the Respondents except one. The April 21, 1945, lease had ten producing wells therefrom when the case was tried (R. 330). Under the authority of *Thompkins* v. *Erie R. Co., supra,* the general law of the State of Mississippi controls the rights of the parties, but not so with the opinion of the Circuit Court of Appeals here complained of; and the opinion of the Circuit Court of Appeals is contrary to the decisions of other Circuits and to this Court.

> "The general rule is that, when two or more trustees hold property jointly, both or all are necessary and indispensable parties in any action concerning it." *Caylor* v. *Cooper*, 165 Fed. 757. See also *O'Hara* v. *MacConnell*, 93 U.S. 150, 23 L. Ed. 840; *Thayer* v. *Life Association*, 112 U.S. 717, 5 S. Ct. 355, 28 L. Ed. 864; *Billings* v. *Aspen*, 51 Fed. 338; *Franz* v. *Buder*, 11 F.2d 854 (C.C.A., 8th); *Young* v. *Powell*, 179 F.2d 147 (C.

C.A., 5th); *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 1283; *Yandell* v. *Wilson*, (Miss.) 183 So. 382.

"A court can take no jurisdiction of the legal title of trust property without making the trustee a party." *Phipps* v. *Tarpley*, 24 Miss. 579. See also *Shelby* v. *White*, (Miss.) 130 So. 343.

At all times Petitioner has denied its liability under the law, and has sought to demonstrate this through pointing to the Supreme Court of Mississippi opinion and amendment thereto. Petitioner's answer to the complaint and amendment thereto contain such denials and also affirmatively plead defenses, including the fact that under the Mississippi Supreme Court decision the then only surviving trustee, J. Gaillard Martin and Francis C. Martin were adjudged under the last will and testament of the deceased to "hold, own and manage" the property, and which carried with it the right to execute oil, gas and mineral lease (R. 164-165). In dealing with this right of sale and use of property, said will provided for "Anna F. B. Martin Eslick to have my interest in Berkely, also the Pass Christian property, or if sold, what was invested therefrom." (R. 159). Mississippi is place of residence of Mrs. Eslick. The lease of the testamentary trustees vested in Humble Oil & Refining Company right to production of oil and gas from the Berkely Plantation property in which the deceased owned an undivided 1/6th interest in the minerals. This lease was a warranty lease (R. 82 and 202). Surely all the parties affected by a trust must be joined in any action by anyone of them against the trustees to restore the corpus of the trust, but which was not done here; and surely any litigation that would restrict the trustee or un-do his warranties or affect other beneficiaries and holders of a life estate would necessarily require all of those to be affected

to be identified as parties, and when this is done, the jurisdiction of the Federal Court is at an end because there would not be the needed diversity of citizenship. The general law is that a trustee selling, or failing to sell, "the trust property in violation of the trust agreement or in breach of his duties is liable for the resulting damages." 90 *C.J.S.*, Section 299, Trusts, p. 465. Since the property was to be "held, owned and managed" by the trustees named and their successors in office for the use and benefit of Anna F. B. Martin Eslick for the term of her natural life, the trustees were obligated to do best by the holder of the life estate. *Wyse* v. *Dandridge et al.*, 35 Miss. 672. "* * * power of sale will be implied, wherever duties are imposed on the trustee which cannot be performed without it." *Corley* v. *Bishop*, (Miss.) 58 So. 360.

If the opinion of the Circuit Court of Appeals for the Fifth Circuit in this cause is to prevail, then the trustee will be guilty of a breach of warranty in the oil, gas and mineral lease, and your Petitioner will be entitled to require the trustee to return funds heretofore paid under provision of the judgment of the Supreme Court of Mississippi providing for the payment of all oil royalties to the trustee; and all of this will be contrary to the law existing in Mississippi which provides "that the rule is that all persons who are materially interested legally or equitably in the subject matter of a suit ought to be made parties therein." *Lewis* v. *Jefferson*, (Miss.) 161 So. 669. The opinion of the Supreme Court of Mississippi provided that it was the duty and obligation of the trustee "to collect any royalties payable under said oil, gas and mineral leases as such trustee; and subject to the approval of the Chancery Court of Harrison County, Mississippi, he is hereby authorized and directed to reinvest said funds and to pay the interest derived from the investment of said funds to the

beneficiaries under said trust." (R. 165). In considering the duties and obligations of parties in relation to oil and gas as compared to other minerals, the Supreme Court of the United States has defined the nature of oil and gas and what constitutes waste, contrary to what the said District Court and said Circuit Court of Appeals say, as follows:

> "No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of this right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in place of deposit. In Brown v. Spilman, 155 U.S. 665, 669, 670, 15 S. Ct. 245, 247, 39 L. Ed. 304, 305, these distinctive features of deposits of gas and oil were remarked upon." *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 20 S. Ct. 576, 44 L. Ed. 729.

Berkely Plantation consisted of 1350 acres of land and Mrs. Anna F. C. Martin at her death on December 3, 1942, owned an undivided 1/6th interest of minerals therein which was then under lease to the Humble Oil & Refining Company (R. 295). The heirs at law of Mrs. Anna F. C. Martin, deceased, were J. Gaillard Martin, Francis C. Martin, Anna F. B. Martin Eslick, and Eugene Martin, living children, and Mary Frances Martin Dent and Benson B. Martin, Jr., children of Benson B. Martin, deceased son of testatrix. The lease here in controversy was executed on April 21, 1945 (R. 202). Subsequently, Eugene Martin departed this life, leaving Mrs. Mabel W. Martin, his widow, as his only heir at law. The judgment of the Supreme Court of Mississippi provided that the 1/6th interest of Mrs.

Anna F. C. Martin in Berkely Plantation "was devised to J. Gailliard Martin and Francis C. Martin" as trustees under the will of Anna F. C. Martin and the 1/6th interest in Berkely Plantation was "to be held, owned and managed by the trustees named and their successors in office for the use and benefit of Anna F. B. Martin Eslick for the term of her natural life and at her death for the use and benefit of Frederick Martin Eslick for the term of his natural life, and upon the death of the survivor of said beneficiaries the trust is to terminate and the then corpus is to be delivered to the heirs of Anna F. C. Martin." (R. 164-65).

The undisputed testimony of Don Caldwell, geologist, was that "serious drainage would have occurred in certain sands" if the property had not been produced (R. 327). Gulf Oil Corporation had producing wells in the area (R. 328). He testified, "They would have been seriously drained." (R. 337).

The opinion and judgment of the Circuit Court of Appeals violate the general rules of construction as to contracts and are contrary to opinions of the Supreme Court of the United States, to opinions of other Circuit Courts of Appeals and to other opinions of the Fifth Circuit; and in the very nature of things the property rights of parties other than Respondents and of said Respondents are being taken away by a failure of the court involved to recognize the judicial rights of the parties, and in violation of the 5th and 14th Amendments to the Constitution of the United States. The fugitive nature of oil and gas requires action. A long time ago the Supreme Court of the United States said of oil and gas the following:

> "They belong to the owner of the land, and are part of it, so long as they are on it or in it or subject to his control; but when they escape and go into other land,

or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land, and taps a deposit of oil and gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. Brown v. Vandergrift, 80 Pa. 147; Westmoreland & C. Nat. Gas Co.'s appeal (130 Pa. 235), 18 Atl. 724 (5 L.R.A. 731)." *Brown* v. *Spilman*, 15 S. Ct. 247, 155 U.S. 665.

In the case of *Ohio Oil Co,* v. *Indiana, supra,* in addition to that already quoted, the Supreme Court of the United States has stated that oil and gas, like other minerals, are situated beneath the surface of the earth, but in many other respects such minerals are different because they have no fixed status. They have the power of self-transmission. If the opinion here complained of had prevailed, the oil and gas, except for that done by the Humble Oil & Refining Company through lease of the trustees, would have been recovered by oil companies under leases on adjoining properties. (R. 336). The life tenants and ultimate remaindermen would have lost that of value in oil and gas and the trustee would be charged with dereliction of duty and with having permitted waste of oil and gas which otherwise should have inured to the benefit of the ultimate remaindermen. Now that the trustees have done that which is reasonable and proper and permitted and authorized and contemplated under the last will and testament of the deceased and under the opinion of the Supreme Court of Mississippi and under the general law of the land, still they are about to be required to suffer for that which they were authorized to do and had to do and did for the preservation of the property. The opinion of the Circuit Court of Appeals deprives Petitioner of the 1/30th leasehold interest in and to oil and gas in and under the Berkely Plantation and it takes from the life tenant and the second life tenant their right to income from the funds from the royalty of the 1/30th interest now being held by the trustee under or-

der of the Supreme Court of Mississippi, and the 4/5th interest held by the ultimate remaindermen are likewise affected by this unusual opinion of the United States District Court and of the Circuit Court of Appeals.

Before there was a trial, the United States District Court first held that the original suit of the plaintiffs had failed to name indispensable parties and a copy of letter opinion of said court, dated March 21, 1959, is attached hereto as Appendix "A". Immediately after this March 21, 1959, opinion, attorneys for plaintiffs directed letter to the United States District Judge on March 24, 1959, stating effect of the letter opinion, and a copy thereof is attached hereto as Appendix "B". The trial court thereupon reversed prior position and held that the additional parties were not necessary parties and a copy of the second letter opinion, dated May 21, 1959, which is contradictory of the first, is attached hereto as Appendix "C". Thereupon, a trial was had before the court without a jury. At that time the court concluded that there would first be decided by the court the question of whether or not the plaintiffs were entitled to relief under the complaint and the trial was accordingly separated so that this issue would be heard first and if it should be found that the plaintiffs were entitled to relief sought, there would subsequently be heard the question of what damages may be recovered. (R. 71). Copy of the opinion of the court which is reported in 199 F. Supp. 648 and printed in the record (R. 426-435) is attached hereto as Appendix "D". Subsequently, the court amended his findings of fact (R. 444-46) and a copy thereof is attached hereto as Appendix "E". The judgment of the trial court is printed in the record (R. 446-49) and copy thereof is attached hereto as Appendix "F". Thereafter, on appropriate application therefor and substantially on agreement of the parties relating to appeal on the question of jurisdiction and liability, the trial court entered judgment or order

(R. 453-55) under authority of 28 U.S.C., Section 1292, and a copy of said judgment or order is attached hereto as Appendix "G".

There was and is a genuine dispute between the parties. The District Court and said Circuit Court, we think, have erroneously sought to maintain jurisdiction maybe partly because a case with some similarity styled *Hudson v. Newell*, 172 F.2d 848 and 174 F.2d 546, was decided adverse to one of the judges and he was unable to differentiate between that case and this one. If the District Judge was correct in the first opinion, he was in error in his second opinion with reference to necessary or indispensable parties. This must have been a close question for the District Judge. One of the three judge panel deciding the case for the Circuit Court of Appeals dissented in each instance with statement of dissent in the court opinion on petition for rehearing in words as follows: "I am of the opinion there are absent indispensable parties. This would deprive this court of jurisdiction and leave the matter up to the Supreme Court of Mississippi, which I believe is the proper tribunal to decide this Mississippi question. Therefore I respectfully dissent." The opinion of the Circuit Court of Appeals on direct appeal is printed in the record (R. 471, 483) and a copy thereof is attached hereto as Appendix "H". The opinion of the Circuit Court of Appeals on petition for rehearing, with dissent thereto, is printed in the record (R. 530-31) and a copy thereof is attached hereto as Appendix "I". With the decision of the trial court that the parties other than your Petitioner were not necessary parties, the trial court then concluded that under the judgment of the Supreme Court of Mississippi the surviving testamentary trustee had no right or authority to execute oil, gas and mineral lease, but apparently recognizing that the Supreme Court of Mississippi did not so hold. The opinion of the Supreme Court of Mississippi

is printed in the record (R. 170-187) and a copy thereof is attached hereto as Appendix "J". The opinion of the Supreme Court of Mississippi on suggestion of errors is printed in the record (R. 188-89). and a copy thereof is attached hereto as Appendix "K".

V

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred as follows:

1. In holding that under the authority of 28 U.S.C., Section 1332(a) (1), the United States District Court had jurisdiction even though no kind of relief could be granted without upsetting at least a part of the April 21, 1945, oil, gas and mineral lease executed by the trustee or trustees, and without disturbing property rights of the holders of two separate life estates and four of the five original ultimate remaindermen who ratified the oil, gas and mineral lease of the trustees.

2. In holding that the surviving trustee or trustees did not have right to execute valid oil, gas and mineral lease, as was sought to be done, to bind the ultimate remaindermen since the power of the trustees was fixed under the last will and testament of Anna F. C. Martin, Deceased, as decided by the Supreme Court of Mississippi in case of *Martin* v. *Eslick*, 90 So.2d 635 and 92 So.2d 244, wherein said trustee or trustees were adjudged right to "hold, own and manage" the property, which carried with it the right to execute oil, gas and mineral lease.

3. In construing the last will and testament of Anna F. C. Martin and said April 21, 1945, lease contract contrary to the interpretation given to same by the Supreme Court of Mississippi and contrary to general applicable law and in conflict with local decisions and other decisions of the same

Circuit Court and of the Circuit Court of Appeals for other circuits.

4. In interpreting the last will and testament of said Anna F. C. Martin as it applies to the April 21, 1945, oil, gas and mineral lease in violation of the 5th and 14th Amendments to the Constitution of the United States, depriving Petitioner and others interested in the lease contract and in oil and gas production of vested property rights guaranteed to it and them.

VI.

REASONS RELIED ON FOR GRANTING THE WRIT.

1. The court below has decided that a testamentary trustee and parties holding the first and second life estates under a will and four ultimate remaindermen are not indispensable and necessary parties to suit of other residents of the State of Mississippi seeking to upset existing oil, gas and mineral lease contract with at least ten producing oil wells operating under said lease when such in the very nature of things takes from those beneficially interested and the trustee that to which they are entitled without their day in court.

The court below had jurisdiction if there existed the needed diversity of citizenship and the required amount for jurisdictional purposes. To hold that the court below had jurisdiction, it was necessary to conclude that the testamentary trustee was not a necessary party even though such trustee, with belief that he had right or authority so to do, executed oil, gas and mineral lease on which there have been successfully completed at least ten producing oil wells, and from the production all royalties have been paid to the trustee and retained by him as he was ordered so to do by the Supreme Court of Mississippi dealing with the very subject matter. It was also necessary

for the court to conclude that Mrs. Anna F. B. Martin Eslick, holder of first life estate, and Frederick Martin Eslick, holder of second life estate, and four of the five ultimate remaindermen were not necessary parties, even though those interested as life tenants or life estate holders by the holding of the trial court would be affected because a part of what would otherwise be and become the corpus of the estate would go to the plaintiffs in the original lawsuit and the lease all of the parties had executed, and by which they were bound, would be upset. If the opinion of the Circuit Court of Appeals withstands this attack, money which has already been paid to the trustee as oil royalties will have to be withdrawn from the corpus of the estate and subsequently accruing oil royalties which otherwise would go into the estate would be diverted to the plaintiffs. It is this jurisdiction question, so very important to the litigating public, which should be jealously protected as contemplated by law and for the protection of those affected thereby.

The case relied upon by the opposition and the court below is that of *Hudson* v. *Newell*, 172 F.2d 848 and 174 F.2d 546. What that case holds is that where the plaintiff claims the full title to a tract of land and title thereto is also claimed by several other parties, some of whom are residents of states other than that of the plaintiff and some are residents of the state of the plaintiff, the plaintiff may file a suit against those non-resident claimants and the court has jurisdiction of that suit without requiring the resident claimants to be made parties thereto; but in such action the relief granted shall be limited to the interest claimed by the non-residents and the interest claimed by the resident defendants shall be expressly excepted from the effect of the decree. The language of the court announcing the holding here mentioned is as follows:

"The original complaints asked a decree that the plaintiffs are the true owners of the land and of the mineral rights therein and of the oil and gas removed from it by the defendant oil companies. If they can prove the land and oil are theirs we see no reason why they should not have judgment for them *against those sued*; possible claimants not in court would not of course be bound by the result. If such claimants' title is shown as a defense *their interest can be saved from the decree.*" (Emphasis ours) *Hudson* v. *Newell, supra.*

In the statements of fact in the *Hudson* v. *Newell* case the court makes clear which of the adverse claimants were made parties and which were not, and these facts show to whom the court referred when it used the language in the above quoted section "against those sued" as follows:

"The plaintiffs, * * * brought in the Federal Court the present four suits, which embrace all the land save 20 acres, *making parties only those claimants to each tract as to whom diversity of citizenship existed, and omitting the others.* * * * The first counts seek only to establish by decree the plaintiffs' right in land and oil produced as against persons who are in court. They pray for a decree giving them the entire right, but they cannot be granted that, for it is evident that a part of the adverse claim is not represented before the court, and will have to be excepted, leaving those claimants unaffected." (Emphasis ours). *Hudson* v. *Newell, supra.*

If the testatrix had set up two trusts covering the 1/30th interest in Berkely Plantation, one with a trustee being a resident of the State of Texas, and the other with a trustee being a resident of the State of Mississippi, and each trustee being entrusted with one-half of the 1/30th interest, then, and in that event, under the holding of *Hudson* v. *Newell* the District Court would have jurisdiction of a suit filed by these plaintiffs against the Texas trustee and the Mississippi trustee would not be an indispensable party thereto, but the relief which the Federal Court could grant

could not exceed the one-half interest vested in the Texas trustee.

The decision of the court below is in conflict with decisions of other Circuit Court of Appeals and in conflict with decisions of this Court relating to parties and the rights and responsibilities of the trustee. For sake of brevity, we will quote only four cases.

> "The general rule is that when two or more trustees hold property jointly, both or all are necessary and indispensable parties in any action concerning it. See McRea vs. Branch Bank, 19 How. 376, 15 L. Ed. 688; O'Hara v. MacConnell, 93 U.S. 150, 23 L. Ed. 840; Thayer v. Life Association, 112 U.S. 717, 5 S. Ct. 355, 28 L. Ed. 864; American B. S. v. Price, 110 U. S. 61, 3 S. Ct. 440, 28 L. Ed. 70; Billings v. Aspen, etc., 51 Fed. 338, 2 C.C.A. 252." *Caylor* v. *Cooper*, 165 Fed. 757, 762.

> "The essential purpose of the applicable rule which the district court properly followed requires all the beneficiaries of a trust to be joined in an action by any one of them against the trustees to restore the corpus of the trust, see e.g., Franz v. Buder, 8 Cir., 1926, 11 F.2d 854, certiorari denied 1927, 273 U.S. 756, 47 S. Ct. 459, 71 L. Ed. 876; Young v. Powell, 5 Cir., 179 F.2d 147, certiorari denied 1950, 339 U.S. 948, 70 S. Ct. 804, 94 L. Ed. 1362, in order to avoid the unfair repetition of actions against the defendant trustees which could result from individual relitigation by each successive beneficiary if the first plaintiff lost. * * *

> "* * * As we have already held that the other beneficiaries are indispensable parties when one seeks to assert a claim for surcharge and restoration of corpus on behalf of the trust against the trustee himself, we are thus presented with the question whether the requirement is different when the claim in behalf of the corporate defendant is against a third party." *Matthies* v. *Seymour Manufacturing Company*, (C.C.A., 2d) 270 F.2d 365, 370, 373.

"It is well settled that a bailee such as a carrier, who has not converted the property in his hands but has negligently suffered injury to it or by unreasonable delay has caused loss to its owner through a lessened market value, may be held liable for damages, but the owner cannot reject the property if of any value. Southern Express Co. v. Hanaw, 134 Ga. 445, 460, 67 S. E. 944, 137 Am. St. Rep. 227; Brown, Shapleigh & Co. v. Clayton, 12 Ga. 564, 565; Wilensky v. Central of Ga. Ry. Co., 136 Ga. 889, 72 S. E. 418, Ann. Cas. 1912D, 271; 9 Am. Jur., Carriers, § 560." *Robinson v. Georgia Sav. Bank & Trust Co.*, (C.C.A., 5th) 106 F.2d 944, 947, 948.

"Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust. In the absence of such a party a Florida court may not proceed to adjudicate the controversy." *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed. 1283, 1292.

2. The testamentary trustees had right to execute April 21, 1945, oil, gas and mineral lease to Humble Oil & Refining Company.

The trustees were authorized to hold, own and manage the property by the Supreme Court of Mississippi. The rights and powers of a trustee in the very nature of things depend upon the nature of the trust and that contained in the trust instrument and, in this case, in the will itself. The Supreme Court of Mississippi recognized this and even though said Court did in its second opinion, on suggestion of error, alter its first opinion, still there was no holding that the testamentary trustees did not have a right to lease the property. At least the Court did require of the testamentary trustee that he collect all rents and royalties and identify same with the corpus of the estate.

"It is to be observed, that the legal title was in the trustee, who also had possession of the property. Hav-

ing the legal title, he was invested with the power to sell the property, even to the prejudice of his cestuis que trust, so far as the rights of a party purchasing, and obtaining a conveyance of the legal title, bona fide, and for a valuable consideration, were concerned." *Wyse* v. *Dandridge et al.*, 35 Miss. 672.

"It may be stated as a general proposition that the power of sale will be implied, wherever duties are imposed on the trustee which cannot be performed without it. There is some conflict in the authorities on this proposition; but the weight, together with the better reason, sustains this proposition." *Corley* v. *Bishop*, (Miss.) 58 So. 360.

3. The court below, in opinion here complained of, is in conflict with like courts in other Circuits and with opinions of the Supreme Court of Mississippi relating to the rights of the parties in this cause, and contrary to the opinions of the Supreme Court of the United States and violative of the 5th and 14th Amendments to the Constitution of the United States, to deprive Petitioner of due process and equal protection of the law.

In the case of *Thompkins* v. *Erie R. Co.*, *supra*, the law of Mississippi should control, but the court below did violence to the Thompkins case. It is true that the Supreme Court of Mississippi in its original opinion held that the lease was valid and was in full force and effect from the date thereof. It is further true that in the second opinion, based on suggestion of errors, the court held as follows:

"The court's decision involved a construction of the will of the decedent and the determination of the question as to the right of Mrs. Eslick during her lifetime to be paid the royalties derived from an oil lease executed subsequent to the death of the testatrix. *Except to the extent that such decision might affect the validity of any oil and gas lease executed by the testa-*

mentary trustees, the question of the validity of oil and gas leases was not passed upon or decided by the court. It was erroneous, therefore, to incorporate in the judgment a general adjudication of the validity of oil and gas leases." *Martin* v. *Eslick*, (Miss.) 92 So.2d 244 (Emphasis ours).

Judge McCord for the Circuit Court of Appeals for the Fifth Circuit held contrary to what the court has sought to hold in this cause as follows:

"We are of opinion that parties are indispensable when their interests in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that their interest would be directly affected by the decree. This is the definition found in *Shields* v. *Barrow*, 58 U.S. 130, 17 How. 130, 158 L. Ed. 158, and *Barney* v. *Baltimore*, 73 U.S. 280, 6 Wall. 280, 18 L. Ed. 835." *Keegan* v. *Humble Oil & Refining Company*, (C.C.A., 5th) 155 F.2d 971.

"We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's rights, without the party being either actually or constructively before the court." *Mallow* v. *Hinde*, 12 Wheat. 193, 198, 6 L. Ed. 599.

This is a case dealing in part with attempt to obtain a declaratory judgment. The court below failed to recognize and gave expression of law contrary to decision from the Tenth Circuit.

"Ordinarily, in an action for a declaratory judgment, all persons interested in the declaration are necessary parties." *Franklin Life Ins. Co.* v. *Johnson et al.*, (C.C.A., 10th) 157 F.2d 653, 658.

"If the absent party's legal interest is cognizable in the suit but is not joint with that of the plaintiff or the defendant, and he should be joined in order to afford complete relief to those already parties, then he is a necessary party and must be joined if subject to the process and within the venue of the court." *Samuel Goldwyn, Inc., et al.* v. *United Artists Corporation,* (C.C.A., 3rd) 113 F.2d 703, 707.

WHEREFORE, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court, and that this petition should be sustained and writ of certiorari issued as contemplated by law.

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